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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1545

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual,

Petitioners,

vs.

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

MICHAEL N. KHOURIE,
THOMAS PAINE,
One California Street
San Francisco, California 94111
Counsel for Petitioners.

BROAD, KHOURIE & SCHULZ,
One California Street
San Francisco, California 94111,
Of Counsel for Petitioners.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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Petitioners, The Daily Review, Inc., *et al.,* (defendants below) respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on December 2, 1976. A petition for rehearing and suggestion for rehearing

en banc was denied by the Court of Appeals on February 8, 1977.

OPINIONS OF THE COURTS BELOW

A bifurcated trial of this antitrust action was heard by the District Court for the Northern District of California, District Judge Charles B. Renfrew presiding. A Memorandum of Opinion was issued by the Court on September 6, 1974. That opinion is reported at 383 F.Supp. 1346 (N.D. Cal. 1974) and a copy thereof is attached as Appendix B to this Petition.

On December 2, 1976, the United States Court of Appeals for the Ninth Circuit reversed the trial court's findings that certain of the plaintiffs had failed to prove the *fact* of damage, sustained all other findings of the trial court and remanded the case for further hearings on damages. The opinion of the Court of Appeals is reported at 548 F.2d 795 (9th Cir. 1976) and a copy thereof is attached as Appendix A to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 2, 1976. The plaintiff dealers filed a petition for rehearing which was denied on December 30, 1976. Defendants also filed a petition for rehearing and a suggestion for rehearing *en banc* which was denied by the Court on February 8, 1977. Copies of the Orders denying rehearing are attached hereto as Appendix D and Appendix E respectively to this Pe-

tition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does sympathy for antitrust plaintiffs justify the elimination of the *fact* of damage as an element of proof in antitrust suits brought under Section 4 of the Clayton Act?

2. Can an "assumption", unsupported by human experience and contrary to the record in this case, cure plaintiffs' failure of proof on the *fact* of damage issue?

3. Does mere proof of an antitrust violation, arising from a contractual maximum resale price provision, warrant shifting the burden of proof on the *fact* of damage issue to defendants?

4. Can a Court of Appeals overturn trial court findings of fact, not found to be "clearly erroneous", through imposition of a factual "assumption" without violating Rule 52(a), Federal Rules of Civil Procedure?

STATUTES INVOLVED

1. Section 1 of the Sherman Antitrust Act (15 U.S.C. §1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

2. Section 4 of the Clayton Antitrust Act (15 U.S.C. §15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys' fee."

STATEMENT OF THE CASE

This is a private antitrust suit seeking treble damages and injunctive relief pursuant to sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26). Respondents (plaintiffs below) are a group of newspaper distributors of two newspapers published by the corporate Petitioner, The Daily Review, Inc. ("DRI"). The individual Petitioners are management officials of DRI. The complaint, filed on August 6, 1973, accused defendants of a number of offenses under sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) arising in the context of newspaper distribution.

Upon filing, this case was assigned to the Honorable Charles B. Renfrew, United States District Judge for the Northern District of California. Following extensive discovery, all parties waived trial by jury and a bifurcated trial on the issues of liability, impact and damages was held. That trial consumed 28 trial days and generated a Reporter's Transcript exceeding 4,000 pages in length. At the conclusion of the liability phase of the trial, Judge Renfrew held

that a provision in the Dealer's Agreement between each plaintiff and DRI which required the dealer to resell the newspaper "at the current subscription rate" constituted vertical resale price maintenance *per se* violative of section 1 of the Sherman Act (383 F.Supp. at 1357). After finding the plaintiffs' remaining claims unsupported by the evidence, the Court set a date for trial of the injury and damage issues, focusing on the plaintiffs' loss of profit claims. That trial consumed 8 days of testimony followed by the filing of comprehensive post-trial briefs and proposed findings and conclusions by all parties.

The trial court then rendered an 83 page decision addressing each issue raised by the case. Judge Renfrew therein found that the plaintiffs had failed to prove either the *fact* or amount of damages proximately caused by the existence of the contractual resale price provision found violative of section 1 of the Sherman Act:

> "Based on an exhaustive review of the record and for the reasons set out below, however, the Court concludes that plaintiff's proof of the fact of damage falls short of that clearly required by *Flintkote*. Moreover, since plaintiffs' estimate of the amount of their damages is based on exactly the same facts and theory offered on the question of impact, the inadequacies which the Court finds in that proof require that their damage estimates be rejected as speculative and conjectural." (383 F.Supp. at 1379)

Three independently sufficient grounds for this finding of fact were stated and discussed. First, plaintiffs

failed to show a "reasonable probability" that they would have increased their prices during the damage period in the absence of the contractual restraint (383 F.Supp. 1379-81). Second, plaintiffs failed to prove by credible evidence that they would realize higher profits if they had increased their resale prices (*Id.* at 1381-83). Third, the "after" period during which certain of the plaintiffs allegedly realized greater profits, was "an artificial rather than a real market experience thereby destroying the probative value of the 'before/after' test relied upon by the plaintiffs." (*Id.* at 1383).

By a split decision[1] the Court of Appeals reversed the trial court on this issue and remanded for further trial "of the amount of damages issue as to non-Argus plaintiffs . . ." (548 F.2d at 813). The majority did not hold Judge Renfrew's findings on the weight and credibility of the plaintiffs' damage proofs clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure, or even seriously question the "infirmities" in that evidentiary showing. Instead, the majority relieved plaintiffs of the burden of proof on this issue through the creation of a legal presumption which rests upon profit rather than causation:

> "Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is deal-

[1] A dissenting opinion was filed by the Honorable Russell E. Smith, Chief Judge, United States District Court for the District of Montana, sitting by designation.

> ers are profit maximizers." (548 F.2d at 812, footnote omitted).

The effect of this assumption is to eliminate the *fact* of damage as an element of proof in an antitrust case. If an antitrust claimant could have earned greater profit the trier of fact *must* find that he would have earned greater profit unless the defendant proves otherwise. The simplistic and artificial nature of such a rule was noted by District Judge Smith in his dissent:

> "I think it could be said that it is the universal intention of dealers to make a profit but that there is an intent to profit does not warrant the conclusion that all dealers are in fact 'profit maximizers,' *i.e.*, that they will do all things necessary to make a maximum profit. . . .
>
> "The fact is that some dealers do not do all things necessary to maximize profits. That is why some dealers profit much less than others, and some go broke. Between the intent to profit and the production of a maximum profit lie the factors of energy, imagination, intelligence, and the willingness to take a risk. If the presumption created here goes as far as it must go to support the conclusion, then, in my opinion, it is artificial. I think the testimony in this case discloses the artificiality of it." (548 F.2d at 816; footnote omitted).

REASONS FOR GRANTING THE WRIT

Defendants respectfully submit that Section IV of the majority opinion of the court below merits further review by this Court because the rule there promulgated (A) is in conflict with the applicable decisions of this Court; (B) is in conflict with the decisions of other courts of appeals on this issue; and (C) disregards the limited authority of that court to overturn findings of the trial court, calling for an exercise of this Court's supervisory powers.

A. CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The assumption of the *fact* of damage announced by the court below conflicts with an unbroken line of authority in this Court which requires that an antitrust plaintiff prove actual injury before recovery of damages is permitted. As the Court recently restated this principle in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, ... U.S. ....., 50 L.Ed.2d 701, at 712 (1977):

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violation . . . would be likely to cause.' Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 US, at 125 . . ."

Proof of the *fact* of damage, i.e., that actual injury occurred which was proximately caused by violative conduct has required a greater showing than proof of the amount of such damages. The differing standards of proof in antitrust cases were first articulated in *Story Parchment Co. v. Paterson Paper Co.,* 282 U.S. 555, 562 (1931):

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

In *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, at 264 (1946), the Court established that the *fact* of damage could be proven through the collation of circumstantial evidence which supported a reasonable inference of actual injury proximately caused by the defendants' conduct.

> ". . . a jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from evidence of the decline in prices, profits and values not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

The Court cautioned, however, that "[i]n such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." (251 U.S., at 264).

Judge Renfrew's description of the plaintiffs' damage proofs in this case demonstrates that those claims were pure speculation and guesswork. (See 383 F. Supp., at 1379-1384). As Judge Smith, in dissent, stated:

> "I think that the trial court's findings of fact are sufficient and are supported by the evidence. The trial court here simply did not believe the plaintiffs' witnesses. The trial judge considered the plaintiffs' interests and motives in the case; the lack of corroborating evidence; the plaintiff's self-contradictions; the times at which the claims here made were first made. The court concluded:
>
> > . . . Because of the paucity and doubtful credibility of the evidence on this question, plaintiffs have not satisfied their burden of proof on the first element of the fact of damage. . . . *Knutson v. Daily Review, Inc., supra* note 1, 1381.
>
> Absent believable witnesses, the plaintiffs who did have the burden failed . . ." (548 F.2d, at 816; footnote omitted).

While *Bigelow* would preclude a jury from rendering a verdict on such evidence, the majority of the court below would require a trial court, sitting without a jury, to find for the plaintiff on the *fact* of damage issue on that evidence.

The collation of factors, beyond mere proof of violation, relied upon by the Court in *Bigelow*, was also relied upon to prove the *fact* of damage in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, at 123-25 (1969). In reinstating the trial court's award of damages arising from exclusion of Zenith from the Canadian television market, the Court emphasized Zenith's proven efforts to enter that market and the practices of the patent pool to frustrate such entry. The Court concluded that "[t]he trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." (395 U.S., at 125).

The absence of any corroborating circumstantial evidence that plaintiffs would have increased their prices but for the contractual price provision or, if such increases had been made, have received greater profits (see 383 F.Supp., at 1379-1384) left the trial court with nothing but the plaintiffs' testimonial speculation. Awards on such insubstantial grounds have been consistently condemned by this Court and lower federal courts. *See, e.g.: Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1360-61 (9th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, at 153 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975). As the *Shumate* court held:

> "[W]ith only his *ipse dixit* to establish the fact of damage, Shumate would have this Court find his testimonial speculation and contentions supply the basis for a jury issue as to the fact of damage. But more evidence than this is necessary

> to demonstrate that there has been injury before the jury can be allowed to consider the amount that would properly compensate him for such injury."

The trial court's requirement of proof of a reasonable probability that injury occurred in a maximum resale price maintenance case does not "create a nearly insurmountable barrier to recovery" (548 F.2d, at 812). Rather, it focuses attention on that aspect of the defendants' conduct which renders it unlawful under the antitrust laws: the restraint of independent traders' freedom "to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, at 213 (1951); *Albrecht v. The Herald Company,* 390 U.S. 145, at 152 (1968). A reasonable probability that the dealer's pricing decision would be different in the absence of the contractual provision is essential to show that the restraint had any impact upon the business of the plaintiff or upon competition in the marketplace.

This requirement in a maximum resale price case serves the same purpose as the requirement that a plaintiff make a demand for supplies before he can recover in a group boycott case [*see e.g. Dahl, Inc. v. Roy F. Cooper Co.,* 448 F.2d 17, 19 (9th Cir. 1971); *Cleary v. National Distillers & Chem. Corp.,* 505 F.2d 695, 697 (9th Cir. 1974)], or prove intent, preparedness, and capability for market entry before he can recover for exclusion from a market. [*See e.g. Zenith Radio Corp. v. Hazeltine Research, Inc., supra,*

395 U.S., at 126, 127; *Martin v. Phillips Petroleum Corp.*, 365 F.2d 629, at 633 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).] Proof of actual, rather than conjectural, injury is not unreasonable before an antitrust defendant is subjected to treble damage liability. Such proof may be circumstantial and inferential, but justice surely requires more than the plaintiff's profit expectations to establish the *fact* of damage.

The majority opinion of the court below rejects these reasonable limits upon proof of the *fact* of damage and converts the test of viable damage claims from actual business decisions and conduct to abstract economic theory. That opinion renders the antitrust defendant in a vertical maximum price case an insurer of the maximum profits which dealers might earn. Such a result is contrary to *Story Parchment, Bigelow, Zenith* and *Brunswick*. As Professor Areeda stated in Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127 (1976):

> "the desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are nonexistent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability."

The ruling of the court below is against the evidence and contrary to the policy of section 4 of the Clayton Act. That ruling mandates windfall recoveries without even a reasonable probability that actual injury has been suffered. Treble damage liability for actual injury caused is a sufficient penalty and deter-

rent. Treble damage liability for injuries which are merely speculative or conjectural is unwarranted.

B. CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS

The decision of the majority in the court below is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Kestenbaum v. Falstaff Brewing Corporation,* 514 F.2d 690 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976). In that case, the plaintiff beer dealer charged Falstaff with imposing a maximum resale price and then enforcing it through arbitrary wholesale price increases equal to one-half of any retail price increase initiated by plaintiff. The court rejected the plaintiff's claim for loss of profits resulting from these wholesale price increases:

> "While Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a *per se* violation. A prerequisite to Kestenbaum's recovery on this issue was a showing that the price ceiling on sales by him, disregarding the price charged to him, caused injury. Not only did he fail to prove this, he established that the wholesale price which Falstaff allegedly fixed was a proper price. While the fact of injury often involves evidentiary questions which are properly for the jury [e.g., Story Parchment Co. v. Paterson Parchment Paper

> Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548 (1931)], no jury issue exists where, as here, the plaintiff fails to offer any competent evidence to establish that the defendant's wrongful price-fixing activity produced injury to him." (514 F.2d, at 694)

The conflict between these two courts on this issue is even deeper than this passage would suggest. The majority in the court below has held that the trial court must *assume* the fact of injury and then require defendants to establish that a plaintiff would resell at less than a "profit maximizing" price in order to diminish the *amount* of damages recovered. The *Kestenbaum* court not only avoided creating a legal presumption but held that the trial court should have directed a verdict *against* the plaintiff. In doing so the court stated:

> "We recognize that leniency should be permitted in showing damages in private antitrust actions, however, a damage assessment based wholly on speculation and guesswork is improper. *E.g.*, Bigelow v. RKO Pictures, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946). Because proper proof of injury and of damage was missing, the district judge should have directed a verdict for defendant on this aspect of plaintiffs' price-fixing claim." (514 F.2d, at 659).

Accord: Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1371-1372 (5th Cir. 1976), *cert. denied* ..... U.S. ....., (February 22, 1977); *Response of Carolina, Inc. v. Leaseco Response, Inc.*, 537 F.2d 1307, 1321-1323 (5th Cir. 1976); *M.C. Manufacturing*

Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1063-1064 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

The damage ruling of the court below conflicts with principles of proof established by this Court and followed by other courts of appeal. In doing so, it turns the law of causation upside down. It rejects the stricter standard of proof necessary for *fact* of damage and shifts the burden to defendants to disprove causation and profit maximization. It converts permissible inferences which a jury might draw into mandatory presumptions which the trial court, sitting without a jury, must draw absent proof to the contrary.[2] Such novel and far reaching consequences so thoroughly in conflict with established principles justify review and correction by this Court.

C. THE LOWER COURT'S DISREGARD OF RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE, CALLS FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION

As noted above, this case was the subject of a protracted trial, numerous pretrial and post-trial hearings and extensive briefing and argument on all issues. District Judge Renfrew was directly involved in all phases of those proceedings and had a daily

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[2]Even where substantial proof to the contrary exists, as it did in instant case (see 383 F.Supp., at 1379-1384), that proof is dismissed as going to the *amount* rather than the *fact* of damage. (548 F.2d, at 812-813).

opportunity to view the witnesses, judge their demeanor and assess their credibility. Throughout those proceedings he demonstrated a profound understanding of the issues, evidence and conflicting interests raised by the case. His conscientious approach is manifested by the comprehensive Memorandum of Opinion he filed in this case.

His findings on the issue of the *fact* of damage are based upon an exhaustive analysis of the testimonial and documentary evidence submitted by the parties. Those findings were entitled to substantial weight under Rule 52(a), Federal Rules of Civil Procedure which provides that a trial court's "findings of fact shall not be set aside unless clearly erroneous." The majority of the court below did not hold Judge Renfrew's findings on the *fact* of damage clearly erroneous—the Circuit Judges merely disagreed with the trial judge and ordered him to assume that fact despite the plaintiffs' failure of proof. In doing so the majority violated the express mandate of Rule 52(a) and deprived the trial court, as finder of fact, of its discretion. This action calls out for correction under this Court's supervisory powers, for the courts no less than litigants should adhere to those rules of practice. As this Court held in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 394 U.S., at 123:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as

> well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co. 333 US 364, 395, 92 L Ed 746, 766, 68 S Ct 525 (1948)."

The ruling of the majority below is not based upon the evidence but rather on its view of economic theory and effective antitrust policy. Rejection of trial court findings is not the proper means and the Court of Appeals is not the proper forum for a policy decision producing such a marked departure from established authority on the issue of the *fact* of damage.

CONCLUSION

The assumption of fact announced by the majority in the court below represents a sharp break from the rulings of this Court and of the other Courts of Appeals. The effect of this assumption is to eliminate the *fact* of damage as an element of proof in private antitrust lawsuits. The conflict between this case, and the prior rulings of the Ninth Circuit, of this Court, and of other federal courts leaves the controlling rule of law on this issue in serious doubt. Given

the central importance of this issue in all private antitrust litigation, resolution of those conflicts by this Court is essential.

Dated, San Francisco, California,
May 6, 1977.

Respectfully submitted,
MICHAEL N. KHOURIE,
THOMAS PAINE,
Counsel for Petitioners.

BROAD, KHOURIE & SCHULZ,
Of Counsel for Petitioners.

(Appendices Follow)